

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

11 DIANDRA DOUGLAS) Case No. SACV 09-1365-DOC (MLGx)
12 Plaintiff,)
13 v.) MEMORANDUM OPINION AND ORDER
14 PATRICK N. SMITH, et al.,) GRANTING PLAINTIFF'S MOTION
15 Defendants.) FOR WRIT OF ATTACHMENT
16)

I. Factual and Procedural Background

19 On March 12, 2010, Plaintiff Diandra Douglas filed an application
20 for right to attach order and writ of attachment against Defendants,
21 Patrick N. Smith ("Patrick"), his wife Susan Smith ("Susan"),¹ and QRI,
22 LLC ("QRI"), a California limited liability company.² On April 2, 2010,

24 ¹ The parties note that divorce proceedings are currently pending
25 between Defendants Patrick and Susan Smith. In addition, no one
26 contests the authenticity of the declarations filed in the dissolution
27 proceedings (*In re Marriage of Smith*, Santa Barbara Superior Court Case
No. 1304692), which are attached as Exhibits 1-3 to the Declaration of
Andrew S. Pauly ("Pauly Decl."), attorney for Plaintiff.

28 ² QRI was formed by Patrick and Susan Smith for the purpose of jointly owning and acquiring property. Patrick and Susan Smith are co-members of QRI, and Patrick is the sole manager. Pauly Decl. ¶ 6, Ex.

1 Patrick and QRI filed an opposition to Plaintiff's application and
2 Susan filed a separate opposition. On April 14, 2010, Plaintiff filed
3 a consolidated reply to Defendants' oppositions. A hearing was held on
4 the applications on April 20, 2010.

5 The underlying facts are largely undisputed by the parties. On
6 May 1, 2008, Plaintiff and Defendant QRI entered into a written
7 contract under which QRI leased Plaintiff's real property located at
8 936-940 Hot Springs Road, Montecito, California (the "Premises"), at
9 the rental rate of \$40,000 per month. Declaration of Diandra Douglas
10 ("Douglas Decl.") ¶¶ 6, 7, Exs. 1, 3. For \$2 million, to be paid in
11 two \$1 million installments, QRI also acquired an option to purchase
12 the property (the "Option Agreement"). Douglas Decl. ¶ 4, Ex. 1.
13 Patrick and Susan Smith both signed a document in which they
14 guaranteed QRI's obligations under the contract. QRI made the first \$1
15 million option payment in May 2008, but did not make the second \$1
16 million option payment, which came due on May 1, 2009. Douglas Decl.
17 ¶ 4. QRI also stopped making the monthly rental payments in May 2009.
18 Douglas Decl. ¶¶ 12, 13. Plaintiff seeks a writ of attachment in the
19 amount of \$1,341,666.67³ against the property of each of the
20 Defendants.⁴

21 //

22 //

23

24 1 ¶ 6, Ex. 2 ¶ 10.

25 ³ This total includes the second \$1 million option payment that QRI
26 failed to make, prejudgment interest in the amount of \$91,666.67, and
\$250,000 in estimated attorneys' fees and costs.

27 ⁴ The Court has already granted Plaintiff's application for writ
28 of attachment against Defendant QRI, LLC (Docket No. 49).

1 **II. Applicable Law**

2 Federal Rule of Civil Procedure 64 provides for prejudgment
3 attachment and other prejudgment remedies. A United States district
4 court, addressing a motion for prejudgment attachment in a diversity
5 action, generally applies the law of the state in which the district
6 court sits. See Fed. R. Civ. P. 64; *Granny Goose Foods, Inc. v.*
7 *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S.
8 423, 436-437 (1974); *United States v. Van Cauwenberghe*, 934 F.2d 1048,
9 1063-64, n. 13 (9th Cir. 1991). Therefore, in this case, the Court
10 will apply the California prejudgment attachment statutory scheme.
11 California Code of Civil Procedure §§ 481.010, et seq.

12 A prejudgment writ of attachment may be issued to secure the
13 amount of the claimed indebtedness, as well as the estimated costs and
14 allowable attorney's fees. Cal. Code Civ. Proc. § 482.110(b). The
15 burden is on the moving party to establish entitlement to a writ of
16 attachment. *Loeb and Loeb v. Beverly Glen Music, Inc.*, 166 Cal.App.3d
17 1110, 1116 (1985); see also Legislative Committee Comment to 1974
18 Addition to Code of Civil Procedure § 484.090 (stating that the
19 "plaintiff has the burden of proving (1) that his claim is one upon
20 which an attachment may be issued, and (2) the probable validity of
21 such claim"). Since California's attachment law is purely statutory,
22 it must be strictly construed. *Kemp Bros. Constr., Inc. v. Titan Elec.*
23 *Corp.*, 146 Cal.App.4th 1474, 1476 (2007). Under California law, an
24 attachment may issue only if the claim sued upon is (1) a claim "for
25 money ... based upon a contract, express or implied;" (2) of a "fixed
26 or readily ascertainable amount not less than \$500;" (3) that is
27 either unsecured or secured by personal property; and (4) that is a
28 "commercial claim." Cal. Code Civ. Proc. § 483.010.

1 **III. Plaintiff Has Met the Statutory Requirements for a Writ of**
2 **Attachment Against Defendants Patrick and Susan Smith**

3 There is no dispute between the parties that Plaintiff's claim is
4 (1) for money based upon a contract, the option agreement; (2) of a
5 fixed or readily ascertainable amount not less than \$500, i.e., the \$1
6 million dollar option payment that became due on May 1, 2009; and (3)
7 the obligation is not secured by any interest in real property. Cal.
8 Code Civ. Proc. § 483.010, Douglas Decl. ¶ 4. The only real dispute
9 between the parties is whether Plaintiff's claim against Defendants
10 Patrick and Susan Smith is a "commercial claim" within the meaning of
11 the statute.

12 **A. The Claim Against Patrick and Susan Smith Arises Out of**
13 **Their Conduct of a Trade, Business or Profession**

14 Commercial claims against individuals must arise out of the
15 defendant's conduct of a trade, business or profession. Cal. Code Civ.
16 Proc. § 483.010(c); *Kadison, Pfaelzer, Woodard, Quinn & Rossi v.*
17 *Wilson*, 197 Cal.App. 3d 1, 4 (1987). What constitutes a "trade,
18 business or profession" has yet to be definitively construed.
19 Generally, it means an activity carried on "for the purpose of
20 livelihood or profit on a *continuing basis*." *Nakasone v. Randall*, 129
21 Cal.App.3d 757, 764 (1982) (emphasis added).

22 Attachment of the assets of individual guarantors of corporate
23 obligations or business debts is proper if the guaranty arose out of
24 the conduct of the guarantor's business, that is, if "the guarantee of
25 the primary obligor's debt sued upon is part and parcel of an activity
26 which occupies the time, attention and effort of the guarantor for the
27 purpose of livelihood or profit on a *continuing basis*." *Advance*
28 *Transformer Co. v. Super. Ct.*, 44 Cal.App.3d 127, 144 (1974) (emphasis

1 added) (finding attachment proper where a husband and wife guaranteed
2 a promissory note as payment for business materials of a closely held
3 corporation.) Accordingly, attachment may issue against an individual
4 guarantor who is: (a) in the business of extending credit generally,
5 or (b) so involved in the primary obligor's business that the guaranty
6 is made to further the guarantor's livelihood or profit on a
7 continuing basis. *Id.* It is immaterial whether the individual
8 guarantor is dependent upon the business for his livelihood or devotes
9 little time to it. *Id.* at 135.

10 In determining whether attachment was appropriate against the
11 guarantors in the *Advance Transformer* case, the court distinguished
12 between conduct demonstrating only occasional investment activity and
13 that involving "carrying on an activity for the purpose of livelihood
14 or profit on a continuing basis." The court held that a writ of
15 attachment may issue to a natural person if any one of the following
16 three circumstances is established: (1) a corporation has habitually
17 been provided with operating capital through the medium of such
18 guarantees by the defendant, or (2) the obligation sued upon has
19 resulted from an extension of credit in reliance upon defendant's
20 continuing guarantee, or (3) the defendant has extensively occupied
21 himself in the management of the primary obligor on a continuing basis
22 and has a major stake in its success. *Id.* at 144. "In short, if the
23 sum total of the circumstances justifies the conclusion that the
24 guarantor occupied himself to a substantial degree and on a continuing
25 basis in promoting his own profit through provision of credit or
26 management to the primary obligor, a guarantee executed in the course
27 of such activity may properly be considered an obligation arising out
28 of the conduct of the guarantor's business." *Id.*

1 The Smiths contend that Plaintiff's claim does not arise out of
2 their involvement in a business conducted on a "continuing basis."
3 Def.'s Opp., Mem. of P. & A. at 8. Patrick first argues that he is not
4 in the "business of" providing corporate guarantees. However,
5 Defendants do not cite any authority that holds that the only persons
6 who can be subject to writs of attachment are those who are engaged in
7 the business of providing guarantees. Neither the structure nor the
8 language of section 483.010 support that construction. Moreover, by
9 his own admission, Patrick has guaranteed real property-related
10 obligations on numerous occasions for up to hundreds of millions of
11 dollars. Pauly Decl., Ex. 1, ¶ 13. For example, Patrick states that he
12 "had personal guarantees which exposed [him] to liabilities of at
13 least \$35,000,000 and as much as \$177,000,000 (or more)." *Id.* In
14 addition, Patrick states that he "had personal guarantees extending to
15 Bank of America (a total loan of \$110,000,000) and Hypo Bank (a total
16 loan of \$524,000,000)." *Id.*

17 The declarations submitted by the Smiths state that they are not
18 in the "trade, business or profession" of providing guarantees in
19 general or guaranteeing residential leases and options to buy in
20 particular. Declaration of Patrick Smith ("Patrick Decl.") ¶¶ 9-15;
21 Declaration of Susan Smith ("Susan Decl.") ¶ 4. Rather, they argue,
22 Patrick's business ventures are commercial and retail real estate
23 development, not related to leasing private residences. Patrick and
24 Susan argue that their guaranty of the option and the lease executed
25 on behalf of QRI was merely an isolated incident and was not part of
26 an ongoing business. They contend that QRI was merely a means for them
27 to hold joint title to their personal residences.

28 However, the record before the Court demonstrates that QRI was

1 and is an active, ongoing business whose purpose was to generate
2 profits that would provide a stream of income to Patrick and Susan.
3 Under the express language of Patrick and Susan's Premarital
4 Agreement, QRI was formed in order to "allow [the Smiths] to acquire
5 joint property with [their] respective separate property interests and
6 have those acquisitions, and [their] financial relationship, governed
7 by business law, not family law. To this end, [the Smiths] formed QRI,
8 LLC, for the purpose of owning and acquiring joint property. [The
9 Smiths] agreed that [they] would be co-members of QRI, LLC, (each as
10 to a 50% share as [their] sole and separate property and that
11 [Patrick] would be the sole manager, serving without compensation."
12 Pauly Decl. ¶ 6, Ex. 1 ¶ 6. "Under [the Premarital Agreement], a new
13 entity entitled QRI, LLC was to be formed and all of [their] existing
14 business interests and all future business interests that either of
15 [them] would acquire would automatically become the property of QRI,
16 LLC, in which each of [them] held a 50% interest." Pauly Decl. ¶ 7,
17 Ex. 2 ¶ 10.

18 Further, under the terms of the First Amendment to Premarital
19 Agreement executed by the Smiths and effective as of September 7,
20 2007, the Smiths agreed to the following clause:

21 5.3 **Investment Opportunities.** Patrick and Susan shall confer
22 with one another regarding the acquisition of any new
23 Capital interest by QRI LLC. In accordance with the
24 foregoing, (i) Patrick shall first offer all such
25 investment opportunities to the parties together through
26 QRI LLC, and if declined by Susan, then Patrick shall
27 have the right to invest his Separate Property to acquire
28 any such Capital interest, individually, as his Separate

1 Property; and (ii) Susan shall first offer all such
 2 investment opportunities to the parties together through
 3 QRI LLC, and if declined by Patrick, then Susan shall
 4 have the right to invest her Separate Property, as her
 5 Separate Property.

6 Pauly Decl. ¶ 8, Ex. 3, Attach. A.

7 QRI's execution of the Option Agreement with Plaintiff appears
 8 to be merely one business transaction among many made by QRI on behalf
 9 of Patrick and Susan. For example, the assets initially contributed to
 10 QRI at its formation include "promote interests" in various real
 11 estate development projects. Pauly Decl., Ex. 1, ¶ 8. In March 2007,
 12 "QRI received approximately \$20,000,000 from a project in Snowmass,
 13 Colorado." Pauly Decl., Ex. 1, ¶ 9. And "[a]pproximately \$5 million
 14 (of those funds) was reinvested on behalf of QRI, LLC." Pauly Decl.
 15 Ex. 2, ¶ 12. Further, Patrick "has been a real estate developer for
 16 approximately 35 years. By his own admission, he has entered into
 17 hundreds of deals and has formed dozens and dozens of business
 18 entities under which he conducts business." Pauly Decl. ¶ Ex. 2, ¶ 11.
 19 Both Patrick and Susan were shareholders in QRI and both apparently
 20 attended QRI shareholder meetings with their respective attorneys.
 21 Def.'s Request for Judicial Notice, Ex. 8 at 68, Ex. 11 at 117.

22 Plaintiff has sufficiently established that the claim against
 23 Patrick and Susan "arises out of conduct of a trade, business or
 24 profession." Cal. Code Civ. Proc. § 483.010(c). Under the test
 25 articulated in *Advance Transformer*, Plaintiff has shown that Patrick
 26 and Susan have "extensively occupied [themselves] in the management of
 27 the primary obligor [QRI] on a continuing basis and ha[ve] a major
 28 stake in its success." 44 Cal.App.3d at 144.

1 **B. The Claim is Based Upon Patrick and Susan Smith's Personal
2 Guaranty of QRI's Option to Purchase the Premises, Not the
3 Smiths' Use of Property for Personal, Financial, or
4 Household Purposes**

5 Patrick and Susan also argue that attachment against them is
6 specifically prohibited under the statute because Plaintiff's claim
7 arises from "the sale, lease or license to use property" which was
8 used by Patrick and Susan "primarily for personal, family or household
9 purposes" under California Code of Civil Procedure § 483.010(c).
10 Def.'s Opp., Mem. of P & A. at 6. See also *Medford v. Super. Ct.*, 140
11 Cal.App.3d 236, 239 (1983)(holding that attachment against residential
12 tenants is prohibited under Cal. Code Civ. Proc. § 483.010(c)). They
13 contend that Plaintiff's claim is based upon their lease of
14 Plaintiff's private residence, which they used as their home during
15 the term of the lease. The declarations provided by Patrick and Susan
16 state that they used the Premises as their personal residence while
17 their primary residence in Santa Barbara was being remodeled. Patrick
18 Decl. ¶¶ 4-7; Susan Decl. ¶ 5. The declarations state that Patrick and
19 Susan ate, slept, hosted family gatherings in the premises. *Id.*

20 However, it is immaterial whether Patrick and Susan used the
21 Premises "primarily for personal, family or household purposes"
22 because it was the business entity, QRI, not the Smiths personally,
23 that entered into the lease and Option Agreement with Plaintiff.
24 Patrick and Susan Smith were merely guarantors of QRI's obligation to
25 make two \$1 million payments under the terms of the Option Agreement.
26 Therefore, section 483.010(c) is inapplicable here because QRI is not
27 a natural person. Because Defendants chose to have their marital
28 affairs governed by business law, rather than family law, and chose to

1 have the lease and Option Agreement executed by QRI, they now must
2 live with the consequences of that decision. Any liability they might
3 have in this action arises from a breach of the guaranty obligation,
4 not the sale or lease of property, and their assets are subject to a
5 writ of attachment.

6 **C. Plaintiff Has Established the Probable Validity of the Claim**

7 In order to secure an attachment, Plaintiff must establish the
8 probable validity of the claim upon which the attachment is based.
9 Cal. Code Civ. Proc. § 484.090(a). Through uncontroverted
10 declarations, Plaintiff has established that QRI breached the Option
11 Agreement by failing to make the second \$1 million payment due by May
12 1, 2009 under the express terms of the contract. Patrick and Susan
13 Smith guaranteed QRI's obligations under the Option Agreement, but
14 also failed to make the second \$1 million payment by May 1, 2009.
15 Therefore, Plaintiff has proven the probable validity of her claim
16 against Defendants.

17 **D. Plaintiff Has Sufficiently Established the Amount to Be
18 Attached**

19 Through uncontradicted declarations, Plaintiff has established
20 that she is entitled to \$1 million for the second payment under the
21 Option Agreement. Plaintiff is also entitled to recover interest on
22 the contract claim from the date the claim arose through the date of
23 judgment. Cal. Civ. Code § 3287(a); Cal. Code Civ. Proc. § 697.010
24 (attachment lien is generally for an amount required to satisfy a
25 money judgment). If the interest rate is not specified in the
26 contract, as is the case here, the "legal rate" is 10% per year. Cal.
27 Civ. Code § 3289(b). Plaintiff claims prejudgment interest in the
28 amount of \$91,666.67, which represents interest of 10% per year owed

1 on the principle sum of \$1 million from the date the claim arose, May
2 1, 2009.⁵

3 **E. Plaintiff's Description of the Property to Be Attached Is**
4 **"Reasonably Adequate"**

5 The description of the property to be attached must be
6 "reasonably adequate to permit the defendant to identify the property
7 sought to be attached." Cal. Code Civ. Proc. § 484.020(e). The purpose
8 of this requirement is to enable an individual defendant to determine
9 whether to file a claim of exemption. *Bank of America v. Salinas*
10 *Nissan, Inc.*, 207 Cal.App.3d 260, 268 (1989). An overly inclusive
11 description in the attachment application does not invalidate it. "We
12 do not understand [the requirement of specificity] to prohibit a
13 plaintiff from targeting for attachment everything an individual
14 defendant owns ... [The statute] allows for the possibility that a
15 plaintiff may want to make such a comprehensive attempt, possibly in
16 order to provoke and resolve an individual defendant's exemption
17 claims all at once." *Id.* Accordingly, Plaintiff's general description
18 of Defendants' property contained in the attachment application is
19 "reasonably adequate" to allow Defendants to determine whether to file
20 a claim of exemption, which they have done, as discussed below.

21 **F. Defendants Have Failed to Adequately Identify the Property**
22 **for Which They Claim Exemption**

23 Under California law, the following property is exempt from
24

25 ⁵ Plaintiff's request for an attachment for attorney's fees in the
26 amount of \$250,000 is denied. The evidence submitted by Plaintiff's
27 counsel to support that amount is insufficient. Therefore, the
28 Plaintiff may only attach the \$1 million due under the contract plus
10% interest in the amount of \$91,666.67 for a total of \$1,091,666.67.

1 attachment: (a) all property exempt from enforcement of a money
 2 judgment; (b) property which is necessary for the support of a
 3 defendant who is a natural person or the family of such defendant
 4 supported in whole or in part by the defendant; (c) "earnings" as
 5 defined by Cal. Code Civ. Proc. § 706.011; and (d) all property not
 6 subject to attachment pursuant to Section 487.010. Cal. Code Civ.
 7 Proc. § 487.020. If a defendant claims that property is exempt from
 8 attachment, and the plaintiff opposes the claim, as is the case here,
 9 the defendant bears the burden of proving that the property is exempt.
 10 Cal. Code Civ. Proc. §§ 484.020, 484.070.

11 Defendants QRI and Patrick Smith claim that all of the property
 12 sought to be attached by Plaintiff is subject to exemption because it
 13 is necessary for Patrick and Susan Smith's support. Def.'s Mem. of P.
 14 & A. at 14; Patrick Decl. ¶¶ 18-23. More specifically, Defendants
 15 argue that all of the property must be sold to satisfy personal debts
 16 and obligations of Patrick and Susan Smith pursuant to the divorce
 17 proceedings in Santa Barbara County Superior Court. Patrick Decl. ¶¶
 18 16, 18, 20-22. Defendants, however, have presented no evidence to
 19 support this argument. Nor have Defendants presented a comprehensive
 20 and current financial statement that would disclose all of Patrick and
 21 Susan Smith's assets, liabilities, income and expenses. See Cal. Code
 22 Civ. Proc. § 703.530(a) (requiring the filing of a financial statement
 23 where the claim of exemption is for property "necessary" for the
 24 support of the judgment debtor and his or her spouse and dependents).
 25 Therefore, Defendants have failed to present evidence that would
 26 enable the Court to determine whether issuing the proposed writ of
 27 attachment would leave the Smiths without any means of support.

28 Similarly, Defendants claim a statutory exemption for various

1 other items, such as contents of safe-deposit boxes; motor vehicles
2 (Cal. Code Civ. Proc. § 704.010); household furnishings, appliances,
3 provisions and personal effects (Cal. Code Civ. Proc. § 704.020);
4 tools and other personal property used in trade, business, or
5 profession (Cal. Code Civ. Proc. § 704.060); private retirement
6 benefits (Cal. Code Civ. Proc. § 704.115); homestead residence (Cal.
7 Code Civ. Proc. § 704.720); and any other property not subject to
8 enforcement of money judgment (Cal. Code Civ. Proc. § 704.210).
9 However, Defendants have failed to identify with particularity the
10 property sought to be exempted, including a specific description of
11 the property and where this property is located. Accordingly,
12 Defendants Patrick and Susan Smith's claims of exemption are denied
13 without prejudice.

14

15 **IV. ORDER**

16 Plaintiff has met all of the requirements under California law
17 for issuance of a prejudgment writ of attachment. Accordingly,
18 Plaintiff's application for writ of attachment and right to attach
19 order is hereby **GRANTED** as to Defendants Patrick N. Smith and Susan
20 Smith in the amount of \$1,091,666.67.⁶ Defendants claims of exemption
21 are denied without prejudice.

22 Dated: April 28, 2010



23
24 Marc L. Goldman
United States Magistrate Judge

25
26 ⁶ The parties are directed to meet and confer to determine which
27 of Defendants' property or properties shall be attached in the amount
28 of \$1,091,666.67 and may submit a stipulated order to the Court
describing the specific property to be subjected to a writ of
attachment.